No. 46330-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent

vs.

BRIAN DeLISLE

Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Daniel Stahnke
Superior Court No. 11-1-01448-7

APPELLANT'S OPENING BRIEF

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pm 9/24/14

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II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err in denying the motion to withdraw the plea based on ineffective assistance of counsel and Mr. DeLisle's lack of capacity to participate in the plea proceedings.?

III. STATEMENT OF THE CASE

A. Procedural History

On August 31, 2011, Brian De Lisle was charged by information filed in the Clark County Superior Court with attempting to elude a pursuing police officer, pursuant to RCW 46.61.024. CP 2. He subsequently entered a plea of guilty to the charge and was sentenced on April 18, 2012. CP 35. He was represented at the plea hearing and sentencing by George Trejo.

New trial counsel Brandy Jeffers filed a timely motion to withdraw the plea on April 15, 2013. CP 51. The court (Judge Rich Melnick) held a hearing on the motion on September 28, 2013 and took testimony from Mr. DeLisle and Mr. Trejo. A second hearing was held on

May 2, 2014, in front of Judge Daniel Stahnke.[1] At this second hearing on the motion to withdraw the plea, the court heard testimony from Dr. Jerry Larson concerning Mr. DeLisle's mental state at the time of the plea.

The court denied the motion to withdraw the plea, RP 139 , and subsequently signed findings and conclusions. CP 70. Mr. DeLisle filed a timely Notice of Appeal from the date of the court's oral ruling. CP 67.

B. Change of Plea Hearing

At the change of plea hearing, Mr. DeLisle was represented by George Trejo. RP 2. He told the court he had had adequate time to consult with his lawyer, and had read the plea statement. RP 2-3. He said he understood that he was giving up his constitutional rights to a trial by pleading guilty. The court then noted that it looked like Mr. DeLisle was having questions about the proceeding but continued ahead with the colloquy. RP 4. The court discussed the applicable standard range for the offense. RP 5.The court told Mr. DeLisle that his license would be revoked as a result of the plea.

Paragraph 11 of the plea statement read as follows:

> I, Brian DeLisle, in the County of Clark, State of Washington, state the following pursuant to *Alford v. North Carolina*; I deny I committed the offense. However, after reviewing the reports with my attorney and discussing my possible defenses, I believe a jury would find me guilty beyond a reasonable doubt and therefore plead guilty to take advantage of the State's offer.
> CP 35 *et seq.*

[1] Judge Melnick was appointed to the Court of Appeals by the governor before this date.

In a series of leading questions, the trial court elicited from Mr. DeLisle that he had driven a vehicle in a reckless manner by speeding and going through stop signs, and that he was being pursued by a officer in a marked vehicle who was in uniform. RP 6-7. The prosecutor supplied additional statements about the driving. RP 8. The court then asked Mr. DeLisle if he thought a jury could convict him if the police testified in the manner suggested by the prosecutor's summation. RP 8. Mr. DeLisle acknowledged that the plea was being made voluntarily, and the court accepted the plea. RP 9

Mr. Trejo then asked the court to impose home confinement as a sentence, because Mr. DeLisle had suffered a head injury several years ago, was on a number of medications, and suffered from seizures, anxiety and paranoid delusions. He noted that Mr. DeLisle had suffered several seizures while in custody recently. RP 10. The court imposed a 90 day sentence on work release with credit for 37 days. RP 11, CP 38.

C. Motion to Withdraw Plea Hearings

Mr. DeLisle's new counsel, Brandy Jeffers, filed a motion to withdraw his plea on April 15, 2013. Her declaration in support of the motion alleged that Mr. DeLisle did not understand that the conviction could lead to the possible forfeiture of his vehicle under RCW 10.105.010. She also alleged that Mr. DeLisle was confused by the proceedings and had not had adequate time to confer with his lawyer as he had been in custody for 30 days before the entry of the plea, and Mr. Trejo lived in

Yakima. Mr. DeLisle had not had an opportunity to see the police reports during the course of his representation by Mr. Trejo. CP 51 .

Ms. Jeffers' declaration also alleged that medical records showed that the jail had reported Mr. DeLisle was having auditory hallucinations on April 4, 2012, shortly before the plea hearing on April 18 and was reportedly confused and disoriented on April 10th and April 16th. He had also not been taking his anti-psychotic medications, specifically Risperidone.[2] She cited a letter from his treating psychologist who had diagnosed him with PTSD, seizures and possibly bi-polar disorder.

At the hearing conducted by Judge Melnick, Mr. DeLisle testified that he had retained Mr. Trejo for a criminal matter and a forfeiture hearing. RP 27. He met with him a total of four times. At the first two meetings, they did not discuss the facts of the case. The first time was to discuss payment of the fee; the second was to discuss conditions of release. RP 27. He did not review the police reports with Mr. Trejo, but recalled Mr. Trejo reading something from the police reports to him. RP 28. He gave Mr. Trejo a list of people who could establish his whereabouts on the date of the incident. RP 29. He did not believe that any of these people had been interviewed by his lawyer. RP 29. He did remember discussing a *Newton* plea with his lawyer. RP 29.

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[2] **Risperidone** (/rɪˈspɛərɪdoʊn/ *ri-**spair**-i-dohn*) (trade name **Risperdal**, and generics) is an antipsychotic drug mainly used to treat schizophrenia (including adolescent schizophrenia), schizoaffective disorder, the mixed and manic states of bipolar disorder, and irritability in people with autism. http://en.wikipedia.org/wiki/Risperidone

He believed he had told Mr. Trejo's office about his mental health issues at the time he hired Mr. Trejo. He had been seeing a psychologist for 10 years at that time. RP 31. Mr. Trejo never asked him whether he was understanding the proceedings. RP 32. Mr. DeLisle did not understand what was happening at the time of the plea, because he had not been taking his medications, and had recently had seizures while he was in the jail facility leading up to the date of the plea hearing. RP 32. He described the effect of not taking his medications:

> I'm not myself. I'm confused. I just kind of--- not real coherent and just not real sure what's going on around me.
> RP 32

He had a closed head injury, suffered from seizures, had memory loss and paranoid delusions and had been diagnosed with post–traumatic stress disorder, and was bi–polar. RP 33.

Mr. Trejo visited him once while he was in custody before the plea. Trejo told him "a *Newton* plea is not admitting guilt and it would not affect [his] forfeiture case." Had he understood all of his options, he would have opted for a trial rather than a plea of guilty. RP 34-35.

On cross–examination, Mr. DeLisle did not recall having another lawyer named Chad Schaff. RP 35. He could not recall if he had asked Mr. Trejo to look into mental health court as a way to resolve the case. RP 36. He was not in the right frame of mind to ask questions during the plea hearing itself. He was "just going through the motions." RP 37. He had entered guilty pleas before, but he signed the paperwork without reading

it. RP 39. He could recall going to trial once in Camas, but not in Oregon. RP 40. He had never been previously convicted of a felony. RP 42. He did not recall telling Judge Melnick that he had had enough time to talk to his attorney, and that he had read the plea statement. RP 40. He had not reviewed the transcript of his plea hearing nor reviewed a video of it, so he did not remember what had occurred. RP 44.

The State called Mr. Trejo as a witness. He originally represented Mr. DeLisle on a forfeiture case, and at the time there was no related criminal case. RP 49. The forfeiture case was premised on conviction for the commission of a felony, namely eluding the police. RP 50. The City of Vancouver was seeking to forfeit his automobile.[3] RP 50.

Mr. Trejo received the discovery on the criminal case and read it to Mr. DeLisle. RP 52. They discussed the reports together. RP 53. He also had email contact with a friend of Mr. DeLisle's named Catalena. RP 53-54. Mr. Trejo discussed with Mr. DeLisle the impact of a plea in the criminal case on the forfeiture case. RP 54. Mr. DeLisle also wanted less jail time and an alternative means of serving any sentence. RP 55. They had discussed Mental Health Court, but Mr. Trejo discovered it was only available in District Court cases in Clark County. RP 56.

Mr. Trejo generally would explain to clients the likelihood of success at trial. He told Mr. DeLisle that based on his statements, he could

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[3] The City was relying on RCW 10.105.010 which states in pertinent part: No property may be forfeited under this section until after there has been a superior court conviction of the owner of the property for the felony in connection with which the property was employed, furnished, or acquired.

not take the stand, and that given the officer's statements of identification of the driver, he did not see a viable defense. However, he had never interviewed the arresting officer or interviewed any other witness. RP 75, 77. He did not recall being given a list of potential alibi witnesses. RP 57-58.

Mr. Trejo felt that the decision to plead guilty had been Mr. DeLisle's. He could not remember when he had gone over the plea statement with Mr. DeLisle, but said that it took place at the jail, and not in the courtroom. RP 59. This discussion, however, was not in one of the attorney client contact rooms but with a window and telephone between them. RP 60. He did discuss an *Alford*[4] plea with Mr. DeLisle. RP 65. Trejo testified that he told Mr. DeLisle that a plea would directly impact the forfeiture proceeding but he would attempt to negotiate to get Mr. DeLisle's car back. He suggested that they offer 50% of the value of the vehicle. RP 61. He did not continue with the forfeiture representation because he felt Mr. DeLisle wanted him to suborn perjury. RP 66-67.

He was aware that Mr. DeLisle had significant mental health problems stemming from his closed head injury. RP 61-62, 73. He got this information when he was first hired. RP 71. He never talked with Mr. DeLisle's psychologist. RP 78.

Mr. DeLisle was not psychotic when they spoke. RP 62. He did not give Trejo any indication that he did not understand the proceedings.

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[4] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970)

RP 63. Mr. DeLisle did not tell him about hearing any voices that were not there. RP 63. Trejo believed that Mr. DeLisle understood the proceedings on the day of the plea and that his mental functioning did not seem diminished. Trejo had previously had two clients with competency issues and did not see that a request for a competency assessment was necessary with Mr. DeLisle. RP 64, 67.

Mr. DeLisle told Mr. Trejo in the jail that he was not getting his medications so Trejo spoke to jail staff about it. He was not aware that the jail staff had reported that Mr. DeLisle was having auditory hallucinations and confused thought processes in early April. RP 74. Nor was he aware that Mr. DeLisle had been having seizures while in the jail.[5] RP 74. He did discuss an *Alford*[6] plea with Mr. DeLisle. RP 65.

At the time of the hearing, Trejo was not angry with Mr. DeLisle. He was angry with his new lawyer for bringing "a frivolous attempt to...set aside his guilty plea all for pecuniary gain." RP 76.

A second hearing was held on May 2, 2014, this time before Judge Stahnke. Dr. Jerry Larsen was called on behalf of Mr. DeLisle. Dr. Larsen is a psychiatrist in private practice. RP 101. He has handled several thousand competency examinations over the years. RP 101. He met with Mr. DeLisle on August 21 and 22nd in 2013 in order to make a

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[5] Mr Trejo had apparently forgotten he had told Judge Melnick at the sentencing hearing that Mr. DeLisle had several seizures while in custody awaiting trial. RP 10.

[6] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970)

retrospective determination of his competency to proceed with the guilty plea on April 18, 2012. RP 101, 108. He administered psychological tests which were designed to measure DeLisle's cognitive ability and one which checked for malingering. The test results suggested that Mr. DeLisle had a cognitive deficit, probably related to trauma, a closed head injury in 2001 and 2005. RP 102-103. His IQ testing showed him to have significant impairment, particularly in the area of short term memory. RP 103.

Dr. Larsen also reviewed Mr. DeLisle's medical records. They indicated he was suffering from trauma induced dementia with a significant memory impairment. He suffered from paranoia, particularly with regard to the police, and also suffered from a seizure disorder. RP 103.

Dr. Larsen also reviewed the medical records from the jail[7] which accompanied the time that Mr. DeLisle had entered his guilty plea in April of 2012. RP 104. Mr. DeLisle was getting three medications, two of which related to his mental status. One was Depakote, which is an anti-seizure medicine, and another was Risperdal, an anti-psychotic medication which can also *promote* seizures. This medication is given to people who are experiencing delusions and hallucinations. RP 104, 107. The jail's

[7] Mr. DeLisle had been in custody from about March 12 until April 18th. RP 69.

nursing notes suggested that Mr. DeLisle was not taking his medications regularly while in the jail. One of the results of that was that he had a *grand mal* seizure two days before the entry of the plea. Typically after a *grand mal* seizure episode, a person can have memory loss and confusion for hours or days afterward. RP 105. He acknowledged that there were entries in the jail records which suggested that earlier in April, up to April 10. Mr. DeLisle's speech was clear and he was not having hallucinations. RP 111.

Based on his review of Mr. DeLisle's records and his psychological testing, he concluded that Mr. DeLisle was not competent to understand the plea proceedings. RP 107, 109. He had not reviewed a video or a transcript of the plea proceedings. RP 112.

D. Trial Court Ruling

Trial counsel argued that Mr. DeLisle did not receive effective assistance of counsel at the plea hearing, and also that the plea was not knowing, intelligent, and voluntary because of his mental state. RP 115-118. The prosecutor argued that Mr. Trejo's performance was not deficient, because although he was aware of the fact Mr. DeLisle had mental problems and had just had a *grand mal* seizure two days before the plea, he was not "psychotic" and appeared to be following what was going on. RP 119. The prosecutor also argued there was not sufficient evidence of Mr. DeLisle's inability to understand the proceedings based on Dr. Larsen's testimony. RP 124-126.

The trial court noted that both in 2006 and 2007, in other proceedings, that Mr. DeLisle had been found competent to proceed with guilty pleas. RP 133. The court found Dr. Larsen's testimony unpersuasive, in part because he had not reviewed the video of the plea hearing. RP 136. The court's own review of the video of the plea hearing led it to conclude that Mr. DeLisle had the ability to understand what was happening. RP 136. The court ruled that there was not substantial evidence presented that Mr. DeLisle was not competent at the time of the entry of the plea. RP 137. The court also ruled that Mr. DeLisle had not proven Mr. Trejo's representation was deficient, and did not reach the issue of whether or not he was prejudiced. RP 139. Written Findings and Conclusions were subsequently entered in accord with the oral rulings. CP 70, *et seq.*

IV. ARGUMENT AND AUTHORITY

A. The trial court erred in denying the motion to withdraw the plea of guilty because Mr. DeLisle did not receive effective assistance of counsel and did not enter the plea knowingly and intelligently due to his mental health issues.

1. Relevant Court Rules

The withdrawal of a guilty plea is governed by CrR 4.2 (f), which states as follows:

> The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice....If the motion is made after judgment, it shall be governed by CrR 7.8.

CrR 7.8(b) provides in pertinent part as follows:

> On motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding for the following reasons:
> (1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order;
> ...
> (5) Any other reason justifying relief from the operation of the judgment.

A plea involves a "manifest injustice" if the defendant does not receive effective assistance of counsel in connection with the plea, or the plea is involuntary. *State v. Wakefield*, 130 Wn. 2d 464, 472, 925 P.2d 183 (1996).

2. Mr. DeLisle did not receive effective assistance of counsel in connection with his plea of guilty.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. *State* v. *Sandoval,* 171 Wn.2d 163, 169, 249 P.3d 1015 (2011) (citing *In re Pers. Restraint of Riley,* 122 Wn.2d 772,780, 863 P.2d 554 (1993)); *McMann* v. *Richardson,* 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). Faulty advice of counsel may render the defendant's guilty plea involuntary or unintelligent. *Sandoval,* 171 Wn.2d at 169 (citing *Hill* v. *Lockhart,* 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *McMann,* 397 U.S. at 770-71). To establish that the plea was involuntary or unintelligent due to counsel's inadequate advice, the defendant must show under the test in *Strickland* that his attorney's performance was objectively unreasonable and that he was prejudiced by the deficiency. *Sandoval,* 171 Wn.2d at 169.

The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). To establish ineffective assistance, a defendant must first demonstrate that his lawyer's performance was deficient. Secondly, he must show he was prejudiced by the deficient performance. To meet the showing on the first prong, a defendant must show that the representation fell below an objective standard of reasonableness based on the circumstances. Regarding the second prong, a defendant does *not* have to show "that the counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland, supra,* at 693. Rather, he need only show

> There is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
> *Strickland, supra* at 694.

a. Failure to investigate and interview potential witnesses constitutes ineffective assistance of counsel.

Part of the function of defense counsel is to investigate potential defenses.[8] This duty applies even when counsel is aware of statements by

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[8] ABA Standards for the Defense Function, **Standard 4- 4.1 Duty to Investigate**

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The

the client constituting admissions. When trial counsel does not interview prospective witnesses for the defense, or conduct sufficient investigation to determine the availability of a defense, he has not rendered affective assistance of counsel. *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). See also: *State v. McSorley,* 128 Wn.App. 598, 605-10, 116 P.3d 431 (2005)(Failure of defense counsel to investigate child luring defendant's claim that he was where he was in order to make a doctor's appointment rather than trolling to lure children where, after trial, evidence is shown that defendant did have such an appointment is ineffective assistance;) Accord: *Lord v. Wood*, 184 F. 3d 1083 (9th Cir. 1999)(failure of counsel to personally interview witnesses constitutes ineffective assistance of counsel)[9]; *Baumann v. United States*, 692 F.2d 565, 580 (9th Cir. 1982)

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duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

[9] "We would nevertheless be inclined to defer to counsel's judgment if they had made the decision not to present the three witnesses after interviewing them in person. Few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial. A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty or biased and testifies to X may persuade the jury that not-X is true, and along the way cast doubt on every other piece of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story. Here, counsel appear to have made their decision to exclude the three witnesses based on a vague impression — apparently a misimpression — that the police and investigators who spoke to the witnesses did not find them credible. We find no such suggestion in the various reports, and this impression may have been dispelled had counsel talked to the boys. Having now heard their story — from their affidavits and district court testimony — we believe a competent attorney would not have failed to put them on the stand." *Lord*, supra at 1095, foot notes omitted.

("We have clearly held that defense counsel's failure to interview witnesses that the prosecution intends to call during trial may constitute ineffective assistance of counsel.").

Mr. DeLisle testified that he had given his lawyer a list of potential alibi witnesses. Mr. Trejo admitted on cross–examination that he had not interviewed anyone, prosecution witnesses or defense witnesses. RP 75, 77. His failure to do any investigation by interviewing witnesses constitutes ineffective assistance of counsel. The trial court erred in finding to the contrary.

Mr. DeLisle was clearly prejudiced by his lawyer's failure to locate and interview potential defense witnesses. The availability of such witnesses would have surely impacted the decision to enter the plea, so there was a "reasonable probability" that this affected the outcome of the case.

b. Mr. Trejo did not adequately investigate his client's mental health issues before the entry of the plea.

In *Personal Restraint of Brett,* 142 Wn.2d 868, 142 P.3d 16 (2001), defense counsel knew or *had reason to know* that their client had some significant mental and medical problems. Further investigation of these issues would have been important information to present as part of the liability case but especially as part of the mitigation case. The court held that defense counsel had a duty to conduct a reasonable investigation into medical and mental health, have such problems fully assessed and, if necessary, retain qualified experts to testify. Their failure to do so

constituted ineffective assistance of counsel, and resulted in the vacation of Mr. Brett's death sentence, in a unanimous Supreme Court decision.

In *Personal Restraint of Fleming*, 142 Wn.2d 853, 16 P.3d 610 (2001), the defendant pled guilty after two psychological examinations were done in aid of developing evidence of diminished capacity. One of the evaluations said that Fleming was not competent to stand trial. No psychological evidence was presented to the court before the plea hearing, and the record did not indicate anything happened at the plea hearing which would suggest Fleming was *not* competent to enter the plea. 142 Wn 2d at 863. While noting that the trial court had not abused its discretion in any way, the Supreme Court vacated the plea and remanded for further proceedings, because the failure of Fleming's lawyers to bring to the court's attention the *possibility* that he was not competent psychologically to enter into the plea constituted ineffective assistance of counsel.

In the present case, Mr. Trejo was aware of the fact that Mr. DeLisle had significant mental health issues before the entry of his plea, since his client had told him about them when he was first hired. RP 61-62, 73. He had not, however, followed up on the information by talking to Mr. DeLisle's psychologist or treating doctor. RP 78. Mr. Trejo became aware that the jail was not giving his client all of his prescribed medications. But he claimed not to know that Mr. DeLisle had been

having auditory hallucinations while in the jail, and had a *grand mal* seizure while in the jail in the week before the plea hearing. RP 74.[10]

Dr. Larson testified that one of the aftereffects of a *grand mal* seizure is that the patient may have memory loss and confusion for hours or days afterward. RP 105. These are the very symptoms that Mr. DeLisle testified about having when he was going through the plea process. RP 32.

Mr. Trejo's knowledge of his client's closed head injury and previous mental health history, coupled with his knowledge that his client was not receiving all of his medications while in the jail, suggests that he should have inquired further both of Mr. DeLisle and of the jail medical staff before proceeding with the plea, to make sure that Mr. DeLisle was able to intelligently and knowingly enter a plea of guilty. His failure to investigate this aspect of the case constitutes ineffective assistance of counsel, under the authority of *Brett*, and *Fleming, supra.*

Mr. Trejo testified that he had represented other clients with mental health issues, RP 64, 67, and had concluded that Mr. DeLisle was competent to enter the plea. However, as the court pointed out in *Fleming*:

> This court has held that a defendant's counsel does not have the power to waive the defendant's right under RCW 10.77.050. *State v. Coville*, 88 Wn.2d 43, 47, 558 P.2d 1346 (1977).
>
> *Fleming* at 866.

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[10] At the plea hearing, Trejo told Judge Melnick that Mr. DeLisle had suffered "a couple of seizures" while in custody, and suffered from "acute psychosis, anxiety as well as paranoid delusions." RP 10.

Mr. DeLisle was clearly prejudiced by his lawyer's failure to ascertain the extent to which his seizures and missing medications affected his ability to function at the plea hearing. As in *Fleming*, any doubt about his client's competency should have been resolved by further inquiry with a trained professional. Mr. Trejo never even bothered to contact Mr. DeLisle's treating psychiatrist to find out whether his client's mental status was sufficiently clear to go forward with the significant waivers involved in a plea of guilty.

This court should hold that the trial court erred in finding that Mr. Trejo's representation was not deficient, and reverse the order denying the motion to withdraw the plea.

c. The plea was not knowing and intelligent.

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 36 P.3d 1005 (2001). A plea that is not knowingly, voluntarily and intelligently entered produces a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505 (1991).

Several days before the entry of his plea of guilty, Mr. DeLisle had experienced a *grand mal* seizure, which left him confused in his mental state. This is a known consequence of such an occurrence, according to Dr. Larson's testimony. Dr. Larson testified that given Mr. DeLisle's medical condition, he was not competent to enter the plea.

A defendant's claim that he was not competent to enter his plea is equivalent to claiming the plea was not voluntary. *State v. Marshall*, 144

Wn.2d 266, 27 P.3d 192 (2001); *State v. Osborne*, 102 Wn.2d 87, 98, 684 P.2d 683 (1984). A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of rationally assisting in his own defense. *State v. Harris*, 114 Wn.2d 419, 427-28, 789 P.2d 60 (1990). The competency standard for standing trial is the same as the standard required for pleading guilty. *Godinez v. Moran,* 509 U.S. 389, 113 S. Ct. 2680, 125 L.Ed. 2d 321 (1993). Whether a person is competent is a mixed question of law and fact. *Drope v. Missouri*, 420 U.S. 162, 174-75 n. 10, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

In *Marshall*, 144 Wn.2d at 270-73, the defendant moved to withdraw his guilty plea, and presented testimony from a neurologist, a neuropsychologist, and a psychiatrist that he suffered from brain damage, bipolar mood disorder, and paranoid schizophrenia. Furthermore, one doctor concluded that the defendant was delusional and suffering from psychotic depression when he pleaded guilty. *Marshall*, 144 Wn.2d at 271-72. The trial court denied his motion to withdraw his plea, citing its own observations of Marshall at the plea hearing. The Supreme Court reversed, holding that where there was substantial evidence that the defendant was incompetent, the court had to hold a competency hearing or grant the motion to withdraw the plea. Since the trial court had done neither, despite holding a hearing on the motion to withdraw the plea at which psychological testimony was offered by both sides, the Supreme

Court vacated the guilty plea and remanded to the trial court for further proceedings.

In *State v. Calvert*, 79 Wn. App. 569, 903 P.2d 1003 (1995), the defendant entered a guilty plea to burglary and forgery charges. He was hit on the head about nine days before the plea with a baseball bat and suffered head injuries, the nature of which were disputed. He moved before sentencing to withdraw his plea. He was then admitted to Eastern State Hospital for observation. The staff psychologist concluded he was competent to enter the plea. Based on this report, and the trial judge's observations of Calvert at the time of the plea, the motion to withdraw the plea was denied.

The Court of Appeals affirmed the conviction. It noted that the nature of the head injury was disputed, and even if Calvert had suffered a concussion, he still may have been competent at the time of the plea. The court noted that the trial judge engaged in a "long colloquy" with Calvert during the course of the plea hearing, and that there were no "external indications of mental impairment" at the time of the entry of the plea. Calvert at 576.

In *State v. DeClue*, 157 Wn. App. 787, 239 P.3d 377 (2010), the defendant pled guilty to manslaughter and unlawful possession of a firearm. Two years later, the defendant moved to withdraw his guilty plea based on the fact that he was taking a number of prescription medications while in jail before the plea that made him feel "like a zombie." At an

evidentiary hearing on the motion to withdraw the plea, DeClue's trial lawyer testified he had not noted any signs of mental impairment and that DeClue had been able to assist him in formulating the plea agreement. DeClue presented no evidence of previous mental illness or injury.

DeClue argued that under *Marshall*, the trial court was obligated to hold a formal competency hearing. The Court of Appeals distinguished *Marshall* on the basis that DeClue had presented " no credible evidence that the medications affected his ability to understand the consequences of pleading guilty." In the absence of such evidence, there was no need to hold a formal competency hearing.

In the present case, Judge Stahnke purported to hold a hearing to determine competency retrospectively. RP 99. There was no expert testimony presented on this issue other than by Dr. Larsen. The court did not appoint anyone, pursuant to RCW 10.77.060 to evaluate Mr. DeLisle. The state apparently affirmatively waived its right to ask for a second examination and essentially conceded that the documentary evidence already presented met the threshold to trigger a competency hearing. RP 98-99.

Like the judge in *Marshall*, the trial court here relied heavily on the appearance of the defendant in the video of the plea hearing, and the fact that Mr. DeLisle had been found competent to enter pleas of guilty on other occasions five years or so in the past. RP 133, 136. The court also discounted Dr. Larsen's testimony and opinion. RP 137. This was despite

the fact that there was no dispute that Mr. DeLisle had a history of a closed head injury, with resulting dementia, had been having auditory hallucinations in the jail and had suffered a *grand mal* seizure shortly before the date of the plea hearing. CP 51 *et seq.* (Jeffers declaration); RP 10, 32, 61-62, 102-103.

Reviewing courts in Washington customarily defer to the trial court's judgment of a defendant's mental competency. *State v. Coley*, 180 Wn. 2d 543, 326 P.3.d 702 (2014); *State v. Ortiz,* 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). A trial court's competency decision will be reversed only upon finding an abuse of discretion. *Ortiz*, *supra.* A trial court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A discretionary decision "is based `on untenable grounds' or made `for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). Moreover, a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Fisons*, 122 Wn.2d at 339.

In *Coley*, the Supreme Court was considering who had the burden of proof *after* a finding of incompetency had been made by a trial court. The court held that in hearings to determine competency, the

burden on the proponent of competency, which might sometimes be the prosecutor, and sometime the defendant, is preponderance of the evidence. 180 Wn. 2d at 555.

The trial court in the present case did not apply the preponderance of the evidence standard in determining whether Mr. DeLisle was competent at the time of his plea. Instead, the court assumed that Mr. DeLisle had to provide "substantial evidence" that he was incompetent at the time of his plea. RP 137, CP 70 *et seq.* "Substantial evidence" is evidence sufficient to persuade a fair-minded person that the finding is true. *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 180 P.3d 874 (2008). Since the trial court applied the wrong legal standard, it abused its discretion in denying the motion to withdraw the plea.

Assuming *arguendo* that the trial court did apply the correct burden of proof, the trial court nevertheless erred in retrospectively finding that Mr. DeLisle was competent at the time of the plea hearing in the teeth of the only expert testimony offered at the hearing. Unlike the defendant in *Calvert*, the nature and effects of Mr. DeLisle's closed head injury were well documented and long standing. Unlike both *Calvert* and *DeClue*, there was testimony by an expert in the present case that Mr. DeLisle was incompetent to enter the plea. Unlike DeClue, who only offered testimony that his medications affected his ability to enter into the plea, Mr. DeLisle offered evidence of his recent seizure and auditory

hallucinations to support Dr. Larsen's opinion regarding competency. And unlike DeClue's lawyer, who testified that DeClue was "very sharp" and "was paying very close attention to his case", Mr. DeLisle's lawyer was aware of his client's history of injury induced mental illness, and emphasized that mental illness to the court at the time of the sentencing, which came at the same hearing as the plea. RP 10.

As in *Marshall* and *Fleming, supra*, the trial court's own belief that the defendant is competent based on the plea colloquy, which often consists of a series of leading questions calling for assent,[11] is not enough to support the conclusion that a defendant is competent when there is evidence that the defendant has some significant capacity issues. Here, it is clear that such issues existed at the time of the plea. Mr. DeLisle had been having hallucinations in the very month the plea hearing took place. He was not taking, or not receiving, all of his medications which included both an anti–seizure and an anti–psychotic medication. He suffered one or more seizures while in custody, the aftereffects of which are confusion and short term memory loss that can last for hours or days. His medical history flowing from his closed head injury included dementia, significant memory impairment, paranoia and seizure disorder. One of his treating physicians had diagnosed him with post–traumatic stress disorder,

[11] Judge Melnick's colloquy here consisted mostly of leading questions about the factual basis for the offense, despite the fact that the plea form indicated that Mr. DeLisle was making an *Alford* plea. RP 6-9. Judge Stahnke reviewed the video of the plea and relied on it in his decision. RP 134.

although Dr. Larson did not see indications of that during his exam. RP 106. In short, the preponderance of the evidence clearly pointed to the conclusion that he was not competent at the time of the entry of the plea. The trial court erred in holding otherwise.

V. CONCLUSION

Mr. DeLisle did not receive effective assistance of counsel at the time of the entry of his guilty plea. His lawyer had not interviewed any of the prosecution witnesses , nor had he interviewed the witnesses that Mr. DeLisle testified he had suggested. Moreover, although he was aware that Mr. DeLisle had significant mental health issues stemming from his closed head injury years earlier, he never interviewed Mr. DeLisle's treating psychiatrist. Also, although he became aware that Mr. DeLisle had suffered seizures while in the jail during the month the plea was taken and had not received or taken his medications while there, he never further investigated Mr. DeLisle's mental state before the plea hearing. Since ineffective assistance of counsel in the taking of a plea constitutes a "manifest injustice," under CrR 4.2, the trial court erred in denying the motion to withdraw the plea.

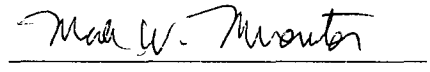
Mr. DeLisle established at the evidentiary hearings conducted by Judge Melnick and Judge Stahnke that he was not competent at the time of the plea hearing. The state at least tacitly admitted the threshold burden for holding a competency hearing had been met, but the court never appointed any expert to examine Mr. DeLisle. The expert testimony

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent vs. BRIAN DeLISLE Appellant.	)	NO. 46330-0-II CERTIFICATE OF SERVICE FOR APPELLANT'S BRIEF

I hereby certify that I caused to be served a copy of: APPELLANT'S OPENING BRIEF upon ANNE CRUSER, counsel for respondent by hand delivery, and on Brian DeLisle, appellant, at the address shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 24th day of September, 2014 with postage fully prepaid.

Dated this 24TH day of September, 2014



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provided by Dr. Larson carried Mr. DeLisle's burden to show he was not competent at the time of the plea, given the longstanding existence of his trauma based mental illness, evidence of recent seizures, and the absence of any contrary evidence from the state. Because he was not competent at the time of the plea, the plea was not intelligent and voluntary. The trial court erred in denying the motion to withdraw the plea.

Dated this 23rd day of SEPTEMBER, 2014

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